

OCT 20 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

American Telephone and Telegraph)
Company)

Petition for the Establishment)
of Additional Standards to Govern)
Study Area Boundary Changes in)
Connection with the Transfer of)
Service Territories Between or)
Among Local Exchange Carriers)

RM-8834

COMMENTS
OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association ("NTCA") submits these Comments to the above Petition for Rulemaking ("Petition") filed on September 3, 1993, and released in DA 93-1128 on September 20, 1993.

INTRODUCTION

NTCA is a national association of approximately 500 small local exchange carriers ("LECs") providing telecommunications services to subscribers and IXCs throughout rural America. NTCA members have a well documented record of success in providing state-of-the-art service to rural, sparsely populated, high cost areas many of which qualify for additional expense adjustments in accordance with the Universal Service Fund ("USF"). A number of NTCA's members have recently entered into arms-length agreements to purchase rural exchanges put up for sale by other local exchange carriers. Some of the exchanges are high cost exchanges

which will be supported by the USF. These members have before the Commission pending requests for waiver of the definition of "study area" contained in the Appendix-Glossary of Part 36 of the Commission's Rules.

In its Petition, American Telephone and Telegraph Company ("AT&T") contends that as many as 1,000 exchanges located in high cost areas may be offered for sale by price cap LECS in the next few years. It gives no substantiation for its figures but states that as much as \$400 million per year will be added to the USF as a result of the alleged sales.¹ AT&T requests a rule making on the basis of this speculative \$400 million impact. It posits that the paramount public interest raised by LEC exchange sales is this supposed impact on USF growth.² On this basis, it requests that the Commission prescribe additional standards for evaluation of study area boundary changes that involve sales or other transfers of exchanges by LECs.

DISCUSSION

I. AT&T'S REQUEST FOR A RULEMAKING IS BASED ON ERRONEOUS PREMISES.

A. AT&T'S factual claims are entirely speculative.

As noted above, AT&T claims that a rulemaking is needed because the support necessary for the USF "may increase. . .by as much as \$400 million annually within the next few years."³

¹ Petition at 7-8.

² Id.

³ Ibid.

Nowhere does AT&T support this claim nor is there any basis for an estimate anywhere near that order of magnitude. In the case of eight petitions for waiver involving 112 rural Montana, Texas, Oklahoma, Arizona and Wyoming exchanges NTCA recently commented on, it noted that as a result of those sales the annual Universal Service Fund obligation will be increased by approximately \$6.4 million. AT&T had made its exaggerated claims in connection with those applications. However, NTCA noted that it would take 62.5 years of similar sales to achieve the speculative \$400 million AT&T claims.⁴ Also, in testimony before the Montana Public Service Commission, an AT&T witness acknowledged, in effect, that it would take 100 sales the size of the pending Montana transactions to create a \$400 million impact.⁵ There is no evidence in the record of the various waiver requests or AT&T petition that transactions of this magnitude and involving such cost levels are contemplated by anybody.

⁴ See, NTCA September 28, 1993, Reply Comments at 2, in Joint Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary of the Commission's Rules, and of Sections 61.41(c), 61.41(d) and 69.3(e)(11) of the Commission's Rules by U S West Communications, Inc., Triangle Telephone Cooperative Association, Inc., et al. in AAD 93-83 et al.

⁵ See, Attachment hereto, Testimony of Patricia A. Parker before Montana Public Service Commission, Utilities Division Docket No. 93.5.23 on September 22, 1993.

B. AT&T has misinterpreted the criteria appropriate for determining whether the public interest requires a "study area" waiver.

AT&T asks the Commission to establish rules that will focus on the supposed growth which will occur in the USF. Under the new rule, the Commission would give preeminent weight to USF growth potential in deciding whether or not to waive its "study area" definition.

AT&T's suggestion ignores the purpose of the 1984 adoption of the freeze as well as Commission criteria for granting waivers. The "study area" definitions in the rules were not intended to discourage the acquisition of high cost exchanges or retard the expansion of service to high cost areas. The requirement that a waiver petitioner demonstrate "no adverse effect" on the USF, has never been adopted by the Commission, but was imposed by the Common Carrier Bureau. U S West Communications and Gila River Telecommunications, 7 FCC Rcd 2161 (1992). Although the Bureau has never defined "adverse", it has approved several waivers on the basis that the impact was de minimus. To the extent "adverse" means not de minimus, the Bureau has exceeded its delegated authority by changing the rule from one designed to prevent manipulation to one designed to prevent improvements to infrastructure in situations in which there is acknowledged to be no manipulation.

In its 1990 Notice of Proposed Rule Making to revise the definition of "study area", the Commission explained that: "the frozen study area definition does not work well in situations involving mergers of study areas or arms-length sales of exchanges."⁶ Thus, the Commission has made it clear that the freeze is intended to prevent holding companies and others from subdividing or isolating their high cost areas either by singular autonomous acts or transfers to affiliates so that they themselves can benefit from increased high cost support.⁷ The Commission thus recognized the need for a rule revision: "We tentatively conclude that a rule change is required and that the new rule should allow changes in study area boundaries which result from mergers of a company's operations or the purchase or sales of exchanges between unaffiliated entities."⁸ Unfortunately, the Commission has not acted further on this matter, although the pleading cycle was concluded on December 14, 1990.

⁶ Notice of Proposed Rule Making in In the Matter of Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 5 FCC Rcd 5974, 5975-6. (1990).

⁷ Id.

⁸ 5 F.C.C. Rcd at 5974.

AT&T's request ignores the Commission's clear statement of its underlying purpose for the rule as well as the Commission's acknowledgement that the rule requires revision to facilitate arms-length transfers. AT&T would have the Commission change its policy in mid stream and proceed as if the reasons the Commission gives for a need to revise the rule were in the first place the reasons for adopting the rule. The Commission should not allow its policies to be undermined by falling into this trap.

AT&T also ignores the fact that the Commission's existing waiver procedures contemplate waivers for good cause. While the Commission may certainly spell out the criteria it utilizes in granting waivers, it may not eviscerate its own rules by establishing criteria that undermine the policies it seeks to promote in its rules, nor may it use the waiver process to create new policy.⁹ This is in effect what AT&T is requesting by asking the Commission to use its processes to alter the manner in which the USF operates, impose additional requirements on certain applications for waiver and hinder exchange transfers that have a USF impact.

In view of the clear inconsistencies between the Commission's tentative conclusions and the predicate of AT&T's request for a rule making, AT&T's petition should be dismissed and the proposed rule adopted. The Commission should obviously not rely on AT&T's exaggerated claims as a basis for beginning

⁹ See, ALLTEL Corp., Inc. v. FCC, 838F. 2d 551 (D.C. Cir. 1988).

yet another rule making to consider a subject already before it. At best, administrative efficiency dictates that AT&T's claims be considered in the proceeding already pending before the Commission.

II. THERE IS NO NEED FOR THE AT&T PROPOSED RULES.

AT&T lists a catalogue of items which it would have applicants provide as a condition precedent to consideration of waiver requests. The Commission should not unnecessarily burden applicants or bind itself to evaluate information unessential to the purpose of the rules. The only relevant inquiry in the case of waivers involving arms-length transactions is whether the transaction is genuine or is instead designed solely to increase USF payments.

Only rarely can it be expected that an arms-length transaction between unrelated parties will raise the concerns which led to adoption of the rule. Given the rule that requires the purchaser to take the property into its rate base at net book value, there is no legal basis for the unconscionable delay that has already been inflicted on rural telephone companies who seek in good faith to bring improved service to the most isolated parts of the country.¹⁰ AT&T seeks to exacerbate the delays by

¹⁰ See, 47 CFR § 32.2000. After eight months, the Commission is still evaluating a petition filed on February 2, 1993, by Nevada Bell and Oregon-Idaho Utilities, Inc. in AAD 93-20. The Commission received a petition from US West and Emery Telephone on October 9, 1992, and released a decision after more than eight months on June 25, 1993, in AAD 92-88. The Commission received a petition from US West and Wiggins Telephone Association on September 24, 1992, and released a decision after eleven months on August 10, 1993.

second guessing and nit picking the business decisions of small rural carriers who have a record of service provision in low density areas that is the envy of the entire world.

At any rate, there is no need to begin a rule making to codify a requirement that the information be filed. One business day after AT&T filed its petition, the Bureau on September 7, 1993, issued Public Notice, DA 93-1093. That Notice entitled "Suggestions for Parties Filing Study Area Waiver Requests" recommends that waiver applicants submit essentially the same data AT&T proposes.¹¹

CONCLUSION

The Commission has announced a broad inquiry into all aspects of the Universal Service Fund.¹² AT&T's concerns will have ample opportunity for exploration in that proceeding. Neither the pending study area waivers nor the hundreds of unfiled ones in AT&T's nightmares can possibly have a material

¹¹ On September 8, 1993, requests for information similar to that which AT&T would require were addressed to parties seeking waivers. See, e.g., Letters from Kenneth P. Moran to Jeffrey S. Bork, Gerard J. Duffy, and William Squires in Joint Petitions for waiver in AAD 93-83.

Whether or not the information requested is relevant or material to any issue raised by a study area waiver, applicants before the bureau have no practical choice but to comply with all such requests. Time is critical in moving rapidly toward closing of transactions which are major undertakings for the small companies. Delay not only means that the citizens of the area are denied badly needed service improvements, but also there will likely be changes in financing terms and construction costs. In the northern part of the country, the construction season is quite limited and preparations are required well in advance of the window of suitable weather.

¹² See, Amendment of Part 36, CC Docket No. 80-286, 93-435 (Sept. 14, 1993).

effect on AT&T's interstate access costs during the interim. The Commission cannot rationally grant AT&T's petition while its own 1990 tentative conclusions and proposed rules remain pending. The administration has clearly stated its telecommunications goal to ensure the universal deployment of information resources at affordable prices.¹³ Further consideration of AT&T's petition, or delay of study area waivers for any reason other than demonstrated manipulation is a direct thumb to the nose of all the President hopes to accomplish, and to the simple desires of the citizens of rural America for improved (or in some cases, any) telephone service.

For the above stated reasons, NTCA urges the Commission to deny AT&T's petition for rulemaking.

Respectfully submitted,

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¹³ See, The National Information Infrastructure: Agenda for Action, (September 15, 1993).

CROSS EXAMINATION OF PATRICIA A. PARKER

**MONTANA PUBLIC SERVICE COMMISSION
UTILITIES DIVISION DOCKET NO. 93.5.23**

SEPTEMBER 22, 1993

1 that correct?

2 A. Yes.

3 Q. And taken as a whole, I think it's a fair
4 characterization of your testimony that AT&T would accept
5 these negotiated rates; is that correct?

6 A. Yes.

7 Q. In your testimony, Ms. Parker, at Page 12, lines
8 12 to 13, you mention a "huge" increase in USF.

9 A. Yes.

10 Q. Can you quantify that? How big is huge?

11 A. What was the page again?

12 Q. Sure. It's Page 12, lines 12 to 13.

13 A. That portion of my testimony referred to the
14 collective impact of the sale of exchanges by other
15 companies or other RBOC's, as well as US West.

16 Q. I realize that, but my question is: How big is
17 huge? Can you quantify it?

18 A. It was quantified at roughly \$400 million, which
19 the current fund is at \$700 million.

20 Q. And the Purchasing Companies in this transaction
21 have projected an increase of approximately \$4 million; is
22 that correct?

23 A. Correct.

24 Q. So the impact of the Montana sales is about one
25 percent of this huge impact that you're projecting?

1 A. Yes.

2 Q. And even after the sale, wouldn't you agree that

3 Montana still will get only about 2 percent of the USF?

4 A. I don't know. I've never calculated that.

5 Q. You testified that other RBOC's intend to sell

6 high cost exchanges, correct?

7 A. Yes.

8 Q. So I take it, then, that these other exchange

9 sales, in AT&T's opinion, will account for approximately 99

10 percent of this increase in USF?

11 A. No.

12 Q. Why is that?

13 A. There's also sales going on in Arizona, Colorado,

14 Wyoming, and we believe that US West will be selling other

15 exchanges in other states, so --

16 Q. That was my question. Do you believe that these

17 sales in other states will account for the remaining 99

18 percent of impact on USF?

19 A. Yes.

20 Q. You've talked a little bit, and I believe even

21 read part of the Wiggins Order; is that correct?

22 A. Yes.


23 Q. And the Wiggins Order, as you said, capped USF

24 impact at \$10,000; is that correct?

25 A. Yes.

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Comments of the National Telephone Cooperative Association in RM-8334 was served on this 20th day of October 1993, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:


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